IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JISHA MATHAI, et al.	:	CIVIL ACTION
	:	
v.	:	
	:	
K-MART CORPORATION, et al.	:	NO. 01-4749

	:	
JISHA MATHAI, et al.	:	CIVIL ACTION
	:	
v.	:	
	:	
PLANTATION-PIONEER INDUSTRIES	:	
CORP., et al.	:	NO. 05-1336

ORDER AND OPINION

JACOB P. HART
UNITED STATES MAGISTRATE JUDGE

DATE: January 20, 2006

I. Introduction

In these consolidated cases, Jisha Mathai, a minor, and her parents, P. Thomas Mathai and Mariamma Mathai, seek recovery for personal injuries Jisha suffered in a fire allegedly caused by the misfunction of an electrical power strip purchased by Mr. Mathai from K-Mart Corporation. In the second of these cases, the Mathais have named as defendants all entities known to have sold power strips to K-Mart during the relevant time period.

One of these corporate defendants, Pacific Electricord Co., ("PEC"), has moved for summary judgment. For the reasons set forth below, its motion will be granted.

II. Factual and Procedural Background

Jisha Mathai sustained a spinal injury causing paraplegia on August 21, 1999, when she jumped from a second-story window to escape a house fire. Complaint at ¶ ¶ 9-15. The Mathais allege that the cause of the fire was a defective electrical power strip. Id. at ¶ 12-13.

As reported by an investigator hired by the Mathais' insurer, "the fire destroyed the identity of [the] overheated six outlet power strip." Response to Motion for Summary Judgment at 4, and Dove Associates Report, attached as Exhibit D to Response, at 5. The Mathais responded "Admitted" to PEC's request for admission stating: "Neither plaintiffs, nor plaintiffs' experts, are able to specifically identify the manufacturer of the power strip alleged to be involved in the fire, which is the subject matter of this litigation." PEC's First Set of Requests for Admissions, and Plaintiffs' Responses, attached to PEC's Motion as Exhibit B. In their response to PEC's Motion, the Plaintiffs confirm that the manufacturer of the power strip cannot be identified. Response at 4.

In its motion for summary judgment, PEC points to the lack of any evidence tying it to the power strip. Moreover, it argues that components of the remains of the fire strip are unlike any power strip manufactured by PEC. In support of this position, it cites expert reports authored by (a) John J. Quinn of Dove Associates, retained by the Mathais' insurer, and relied upon by the Mathais; (b) Daniel L. Churchward, retained by third-party defendant, Woods Industries; and (c) William Ziegler, an engineer in the corporate testing laboratory for PEC's parent company, Levitron.

Specifically, all three reports refer to the remains of the power strip found in the Mathais' home as having "stranded" conductors. Ziegler Report, attached as Exhibit C to PEC's Motion, at 2; Quinn Report, attached as Exhibit D to PEC's Motion, at 3; Churchward Report, attached as Exhibit E to PEC's Motion, at 3. Also, photographs taken in connection with the Churchward and Ziegler reports show stranded wire connections. Churchward Report, supra; Ziegler Report, supra. According to William Ziegler, PEC/Levitron strips use not a stranded wire, but a solid conductor wire. Ziegler Report, supra, at 2.

Mr. Ziegler pointed to other differences between PEC/Levitron products and the Mathai conductor's remains, as well: PEC bars have holes in the buss bar, while the Mathai buss bar has no holes; the Mathai evidence shows a connection threaded through a hole near the first receptacle, while PEC bars have attachment points "at least double the distance from the first receptacle"; and some portions of the Mathai evidence differ in shape from PEC power strips. Ziegler Report, supra, at 2.

In their response to this motion for summary judgment, the Mathais do not challenge PEC's assertion that its products are physically different in these ways from the power strip they have identified as defective. They do not challenge the assertion that the defective power strip used stranded conductors. Nor do they maintain that they are planning, or are entitled to, further discovery, despite the fact that discovery in this case is not scheduled to end until March 3, 2006.

Instead, the Mathais argue: (a) that under § 433B(3) of the Restatement of Torts, and Chelton v. Keystone Oil Field Supply Co., 777 F. Supp. 1252 (W.D. Pa. 1991), they are entitled to switch the burden of proof to the defendants to show which of them sold the power strip; and (b) because a jury could disbelieve the testimony of William Ziegler, a factual issue remains as to whether PEC manufactured the power strip.

III. Legal Standard

Summary judgment is warranted where the pleadings and discovery, as well as any affidavits, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. Pr. 56. The moving party has the burden of demonstrating the absence of any genuine issue of material fact. Celotex Corp.. v. Catrett, 477 U.S. 317, 323 (1986). In response, the non-moving party must adduce more than a mere scintilla

of evidence in its favor, and cannot simply reassert factually unsupported allegations contained in its pleadings. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986); Celotex Corp. v. Catrett, supra at 325; Williams v. Borough of West Chester, 891 F.2d 458, 460 (3d Cir. 1989).

When ruling on a summary judgment motion, the court must construe the evidence and any reasonable inferences drawn from it in favor of the non-moving party. Anderson v. Liberty Lobby, supra at 255; Tiggs Corp. v. Dow Corning Corp., 822 F.2d 358 , 361 (3d Cir. 1987). Nevertheless, Rule 56 "mandates the entry of summary judgment ... against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp. v. Catrett, supra, at 323.

IV. Discussion

A. Plaintiffs Cannot Switch The Burden Of Proof

It is abundantly clear that, under the governing Pennsylvania law, the Mathais are not entitled to employ an alternative liability theory or any other theory to switch the burden of proof to the defendants in this case.

Restatement of Torts § 433B(3), upon which the Mathais rely, follows § 433B(1), which establishes that " except as stated in Subsections (2) and (3), the burden of proof that the tortious conduct of the defendant has caused the harm to the plaintiff is upon the plaintiff." Subsection B(3) itself states:

> (3) Where the conduct of two or more actors is tortious, and it is proved that harm has been caused to the plaintiff by only one of them, but there is uncertainty as to which one has caused it, the burden is upon each actor to prove that he has not caused the harm.

See Pennfield Corp. v. Meadow Valley Elec., Inc., 604 A.2d 1082, 1085 (Pa. Super. 1991).

Crucially, the conduct of two or more actors must be tortious for this concept, commonly called alternative liability, to apply. It cannot apply in a case like this where only one of the defendants committed a tort, even though the plaintiff does not know which one, and the others are blameless.

The Pennsylvania Superior Court explained this in Pennfield, supra, a case in which a pig farmer sued YESCO and Tri-State, two possible manufacturers of a ventilation system which malfunctioned, causing the suffocation of his swine. The Pennfield court rejected the farmer's argument under Restatement § 433B(3), writing:

> Appellant would have us believe that under subsection (3), because it cannot prove that either YESCO or Tri-State harmed it, the burden is on YESCO or Tri-State to prove that they were not the tortfeasor. This is a mischaracterization of the law. The predicate for applying subsection (3) is that "the conduct of two or more actors is tortious." Restatement (Second) of Torts, § 433B(3), *supra*. Subsection (3) is based on the rationale that "injustice [lies in] permitting proved wrongdoers, who among them have inflicted an injury upon the entirely innocent plaintiff, to escape liability merely because the nature of their conduct and the resulting harm has made it difficult or impossible to prove which of them has caused the harm." Restatement (Second) of Torts, § 433B(3), Comment f. Here the appellant has not alleged that the conduct of two or more actors is tortious. Rather, appellant asserts one actor may be tortious while admitting the other actor may not be tortious. It is quite obvious from the rule and the rationale that the burden of proof remains on the appellant, and subsection (3), *supra*, does not apply.

604 A.2d at 1085.

The Pennfield court contrasted the case before it to the seminal alternative liability case, Summers v. Tice, 33 Cal.2d 80, 199 P.2d 1 (1948), where two hunters carelessly fired their weapons into the brush, and the plaintiff was injured by only one bullet.

In this case, as in Pennfield, the Mathais do not, and could not logically, allege that all of the defendants were tortfeasors. For this reason, the Mathais cannot switch the burden of proof using an alternative liability theory. See, also, Mellon v. Barre-National Drug Co., 636 A.2d 187, 190 (Pa. Super. 1993), and Collins v. Gettysburg Hospital, 55 Pa. D. & C. 4th 174, 2001 WL 1900715 (C.P. Adams Aug. 27, 2001) ("[T]he key element is group negligence.").

For similar reasons, the Mathais are also precluded from employing a market share liability theory, such as that used in cases involving the harmful drug DES, where liability is apportioned in relation to the market share of the defendants in the manufacture of the defective product. As the Pennfield court explained:

> It is simply not true that Market Share Liability will exist in these circumstances. [The DES cases] reflected a similar concern to that expressed in Summers v. Tice: it is not unfair to shift the burden to the defendant pharmaceutical companies where their tortious conduct in marketing an unidentifiable unsafe medicine made an injured party unable to prove causation. It is an essential element in Market Share Liability cases that the possible tortfeasors are all perpetrators of negligent conduct. **Even if the appellant had alleged the cables were identical, it would still be incumbent on the appellant to prove which defendant was responsible for the defective cable because either YESCO or Tri-State is an innocent party**.

604 A.2d at 1087. (Emphasis supplied).

Here, as in Pennfield, all defendants except the one that manufactured the single power strip at issue are innocent parties. The Mathais have not even alleged that all of the defendants manufactured identical power strips.

The Mathais cite Chelton v. Keystone, supra, a case in which the District Court for the Western District of Pennsylvania applied an alternative liability principle without citing the Restatement of Torts. There, the court found that sufficient evidence existed to reach the jury on

the question of whether an allegedly defective snap hook was manufactured by defendant Mittelman & Co. The Chelton court then switched the burden to three other defendants, Mittelman's only American distributors, to prove which of them sold the snap hook. 777 F. Supp. at 1258-9. However, the court did so on the basis that:

> If the jury determines that this hook is a Mittelman product and its design is defective, then all these defendants participated in the commercial transfer of a defective product.

Id. at 1258. Here, too, therefore, the key element was group liability.

Because group liability is not at issue in this case, alternative liability theories do not apply. For that reason, the Mathais cannot switch the burden of proof from themselves to PEC.

B. PEC Is Entitled To Summary Judgment

The Mathais have taken the position that the manufacturer of the power strip cannot be identified. Nevertheless, this is not a case where there is no evidence whatsoever about the allegedly defective item because it is missing. See Cummins v. Firestone Tire & Rubber Co., 495 A.2d 963 (Pa. Super. 1985) (manufacturers dismissed as defendants where the allegedly defective tire and rim assembly was lost); Long v. Krueger, Inc., 686 F. Supp. 514 (E.D. Pa. 1988) (plaintiff could not recover under strict liability or negligence where the allegedly defective stool was no longer available).

Instead, this is much more like that portion of Chelton which dealt with identifying the manufacturer of the allegedly defective snap hook. There, some portion of the hook remained. The court found that, although there was no "conclusive" evidence that the hook was manufactured by defendant Mittelman & Company, there was "more than colorable" evidence arising from those remains. 777 F. Supp. at 1255. On this basis, the court denied Mittelman's motion for summary judgment.

The difference between this case and Chelton is that there, the evidence against Mittelman was rather strong.[1] In this case, all of the evidence of which I have been made aware cuts against PEC as the manufacturer of the power strip. As set forth above, William Ziegler, an engineer in corporate testing for PEC's parent company, Levitron, identified four physical differences between the remains of the Mathai power strip, and those manufactured by PEC.

Three of those differences are mentioned only in Ziegler's report, and could therefore be criticized, as Mathai has criticized them, as "self-serving testimony." However, reports from experts not connected to PEC have also noted the existence of stranded connectors, rather than the solid conductor wires used by PEC. Photographs relied upon by Daniel Churchward, the expert for another defendant, also show stranded wire.

In deciding that PEC is entitled to summary judgment, I am not, of course, relying upon any personal knowledge of stranded and solid conductor wires, or an evaluation of the experts' reports. Rather, I must construe all evidence in favor of the Mathais, the non-moving party in this motion for summary judgment. Anderson v. Liberty Lobby, supra. However, as noted above, a non-moving party must adduce some evidence in its favor to survive summary judgment. Id. The Mathais have not done this. They have not even attempted to refute PEC's arguments regarding the dissimilarities between PEC power strips and the power strip at issue in this case. In these circumstances, summary judgment is appropriately granted.

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[1]"There are no identifying marks on the remnant except the word 'Germany.' There are only two German manufacturers of snap hooks, Mittelman and Gerbruder Batz G.m.b.H. ('Batz'). Batz marks its hooks with 'W. Germany' and Mittleman simply uses 'Germany.' Batz does not make any die cast zinc alloy hooks with dimensions similar to the hook in question. ... However, the dimensions of the hook, its composition (die cast zinc alloy) and even the word 'Germany' closely correspond with the Mittelman's model 126-120 snap hook." 777 F. Supp. at 1255.

V. Conclusion

Because PEC has demonstrated the lack of an issue of material fact as to whether it manufactured the power strip at issue in this case, as discussed above, I now enter the following:

O R D E R

AND NOW, this 20th day of January, 2006, upon consideration of Pacific Electricord Co's Motion for Summary Judgment, docketed in this action as Document 17, and Plaintiffs' response thereto, it is hereby

ORDERED that summary judgment is GRANTED in favor of Pacific Electricord Co. and this case is DISMISSED WITH PREJUDICE as to Pacific Electricord Co.

BY THE COURT:

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JACOB P. HART
UNITED STATES MAGISTRATE JUDGE